



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Empower families:** This bill strengthens families inheritance rights by clarifying that an adopted person has the same rights of inheritance as a blood descendant.

**Provides Limited Government:** The bill amends s. 63.182, F.S., to require that any person seeking to set aside an adoption must have a direct, financial, and immediate reason. It applies this restriction to all adoptions, including those in which a judgment of adoption has already been entered.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Present Situation:**

Future of Florida's Families Committee:

**The 2003 Florida Adoption Act:** The 2003 Florida Adoption Act (Chapter 2003-58, L.O.F.), substantially revised the 2001 Florida Adoption Law, with primary focus on the areas of biological fathers' rights, notice and consent, statute of repose and grounds for challenges to termination of parental rights or adoption, statutory forms, venue, adoption fees and costs, and sanctions. A major change involved the creation of a Putative Father Registry within the Department of Health, Office of Vital Statistics, which requires unmarried biological fathers to register with the Putative Registry in order to preserve any right to notice and consent regarding his parental right to a child placed for adoption. The registry replaced existing constructive notice provisions as previously applied to fathers who could not be identified or located. The category of "fathers" for whom notice and consent may be required was revised to incorporate and conform to the new definition of "unmarried biological father."

Specific changes made by the 2003 legislation included:

- Deleting the statutory duty of a mother placing a child up for adoption to identify a potential unmarried biological father.
- Allowing for pre-birth execution of an affidavit of non-paternity.
- Broadening the criteria for abandonment to include evidence of little or no communication or lack of emotional support as basis for termination of parental rights.
- Expanding placement options to permit out-of-state or out-of-the-country adoption of a child.
- Revising venue provisions to include four primary venue options and waiver of venue.
- Revising a number of statutory timeframes including:
  1. Reducing the statute of repose period from two years to one year for any challenge to an adoption or termination of parental rights;
  2. Reducing in half the time period between the date of personal or constructive service and the date of a final hearing;
  3. Extending the time period from seven to 14 days in which to make adoption disclosures to birth and prospective adoptive parents;

4. Extending from 24 hours to seven days in which to forward a judgment terminating parental rights from the clerk of the court to the Department of Children and Families (department or DCF); and
  5. Changing the timeframe in which to file a final home investigation from 90 days after the petition is filed to 90 days after placement;
- Revising the statutory forms for consent to adoption, for adoption disclosure, for notice of service of process, for affidavits of non-paternity and for waiver of venue to conform to changes in the bill in those areas.
  - Revising provisions relating to adoption fees for adoption entities by increasing recovery of pre-approved fees and allowing for flat fee representation and for birth mothers by expanding recovery of pre-birth and post-birth expenses.
  - Deleting requirements that all proceedings for adoption be conducted by the same judge that conducted the termination of parental rights proceedings.
  - Allowing private adoption entities to intervene in the adoptions of children in Department of Children and Families' custody.

Civil Justice Committee:

Florida has established a Putative Father Registry ("Registry") to attempt to preserve the rights of unmarried biological fathers in adoption cases. The Registry is established and operated through the Office of Vital Statistics of the Department of Health. If a man is concerned that he may be the father of a child born or about to be born to a woman, and that man wishes to establish parental rights, he must file as a "registrant" with the Registry.<sup>1</sup>

By filing with the Registry, the potential father is claiming paternity for the child and confirms his willingness to support the child. Additionally, he consents to DNA testing, and may ultimately be required to pay child support. A claim of paternity may be filed at any time prior to the child's birth, but a claim of paternity may not be filed after the date a petition is filed for termination of parental rights.<sup>2</sup>

The possible father may change his mind and prior to the birth of the child execute a notarized revocation of the claim of paternity.<sup>3</sup> Once that revocation is received, the claim of paternity is deemed null and void. Plus, if a court determines that a registrant is not the father of a minor, the court will order the man's name removed from the registry.<sup>4</sup>

All hearings and records in adoption proceedings are confidential.<sup>5</sup> Court hearings are held in closed court, and all papers and records pertaining to the adoption, whether part of the permanent record of the court or a file in the office of an adoption entity, are confidential and subject to inspection only upon court order.

Generally, identifying information regarding the birth parents, adoptive parents, and adoptee may not be disclosed unless that person has authorized in writing the release of that information. Yet, a court may, upon petition of an adult adoptee, for good cause shown, appoint an intermediary or a licensed child-placing agency to contact a birth parent who has not registered with the adoption registry and advise them of the availability of the registry.

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<sup>1</sup> Section 63.054 (1), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Section 63.054 (5), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> Section 63.162, F.S.

The statute of repose provides that an action to set aside a judgment of adoption or a judgment terminating parental rights may not be filed more than one year after the entry of the judgment terminating parental rights.

### **Effect of Bill**

In a proceeding to terminate parental rights, the father must provide the Office of Vital Statistics of the Department of Health ("Office") with a copy of that petition. The Office may not record a claim of paternity after the date a petition has been filed.

The bill directs that if a court determines that a registrant is not the father of a child or has no parental rights; the court must order the Department to remove the registrant's name from the registry. Moreover, the bill corrects the provisions regarding who may execute an irrevocable affidavit of paternity.

Finally, the bill makes a change regarding inheritance rights. Except for the specific persons entitled to be given notice of an adoption, the interest which entitles a person to notice of an adoption must be direct, financial, and immediate and the person must show that he or she will gain or lose by the direct legal operation and effect of the judgment. A showing of an indirect, inconsequential, or contingent interest is inadequate and a person with this indirect interest lacks standing to set aside a judgment of adoption. This applies to all adoptions, including those in which a judgment of adoption has already been entered.

#### **C. SECTION DIRECTORY:**

**Section 1.** Amends s. 63.054, F.S., to require notification of a filing of a petition for termination of parental rights.

**Section 2.** Amends s. 63.062(4), F.S., relating to an affidavit of non-paternity.

**Section 3.** Amends s. 63.182, F.S., relating to the statute of repose.

**Section 4.** Provides this bill will be effective upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Future of Florida's Families Committee has the following potential Constitutional concerns:

**Case Law History:**

The Florida Supreme Court recently interpreted language in s. 39.806(1)(d), F.S., which is identical to language currently in s. 63.089(4)(b)1, F.S. This language allows incarceration of a parent to be the basis for a finding of abandonment of a child supporting the termination of the parental rights of the incarcerated parent when "the period of time for which the parent is expected to be incarcerated will constitute a **substantial** portion of the period of time before the child will attain the age of 18 years (emphasis added)." In *B.C. vs. DCF*, 887 So.2d 1046 (Fla. 2004), the Court held that: (1) the statutes listing incarceration as a ground for termination of parental rights require the court to evaluate whether the time for which a parent is expected to be incarcerated **in the future** constitutes a substantial portion of the time before the child reaches the age of 18; (2) the father's remaining sentence of four years did not constitute a substantial portion of time before his child reached the age of 18 (the child was four years old at the time of the hearing); (3) for purposes of terminating parental rights on the ground of incarceration, a trial court should measure the time of remaining incarceration and minority from the date the termination petition is filed. The Florida Supreme Court had previously ruled, and this decision reaffirmed, that incarceration alone does not, as a matter of law, authorize termination of parental rights on the basis of abandonment. While the *B.C.* ruling was one of statutory interpretation, the Court based its interpretation on the long-established Constitutional principal that parental rights constitute a fundamental liberty interest. For this reason, at least when termination of parental rights is sought based on this ground in chapter 39, the State (petitioner) must, in order to prevail, establish that the termination is the least restrictive means of protecting the child from serious harm, *id* at 1053-1054.

The fundamental liberty interest in raising one's children has caused both the U.S. Supreme Court and the Florida Supreme Court to rule that when that when termination of parental rights is sought and the parent is indigent, the parent may be entitled to representation by appointed counsel.

In *Department of Health and Rehabilitative Services vs. Privette*, 617 So.2d 305, 1993, the court found that there must be clear and compelling reason based primarily on a child's best interest to overcome a

presumption of legitimacy even after the legal father is proven not to be the biological father. This is at least the equivalent of a burden of proof that would exist in proceedings to terminate a legal father's parental rights.

Privette, went on to say:

“ This conclusion is especially compelling in light of the fact that we must establish a neutral rule applicable to all cases of this type. While there may be some cases where the child has had little contact with the legal father, other cases will be quite the contrary. It is conceivable that a man who has established a loving, caring relationship of some years' duration with his legal child later will prove not to be the biological father. Where this is so, it seldom will be in the children's best interest to wrench them away from their legal fathers and judicially declare that they now must regard strangers as their fathers.”

**Rights of unwed fathers:** The United States Supreme Court has protected a putative father's parental rights when he has established a substantial relationship with his child. A substantial relationship is the existence of a biological link, and the father's commitment to the responsibilities of fatherhood by participating in his child's upbringing.<sup>6</sup> The mere existence of a biological link does not merit constitutional protection.<sup>7</sup> The Florida Supreme Court has similarly held that the failure of an unwed father to grasp the opportunity to develop a parental relationship by accepting some measure of responsibility for the child can result in a loss of constitutional protections.<sup>8</sup>

The bill amends s. 63.182, F.S., to require that any person seeking to set aside an adoption must have a direct, financial, and immediate reason. A showing of an indirect, inconsequential, or contingent interest is wholly inadequate. It applies this restriction to all adoptions, including those in which a judgment of adoption has already been entered.

Case law permits certain persons to intervene in adoption proceedings. Florida Rule of Civil Procedure 1.230 governs intervention in civil actions. The rule provides that anyone with an interest in pending litigation may be permitted to intervene in the action. The Florida Supreme Court has explained when intervention should be permitted in adoption cases:

- Generally, the interest which entitles a person to intervene must be shown to be in the matter in litigation. The interest must be direct and immediate and the intervenor must show that he or she will gain or lose by the direct legal operation and effect of the judgment. A showing of indirect, inconsequential or contingent interest is wholly inadequate.<sup>9</sup>
- Whether intervention is allowed is determined on a case by case basis.<sup>10</sup>

One potential concern is whether the “test” established in this bill of direct, financial and immediate is sufficiently clear enough to establish what is in the child's best interest. Without defining what indirect, inconsequential, or contingent means, courts could inconsistently apply this standard.

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<sup>6</sup> See *Lehr v. Robertson*, 463 U.S. 248 (1983). In this case, the U.S. Supreme Court held that the state's failure to give a putative father notice of pending adoption proceedings, despite the state's actual notice of his existence and whereabouts, did not deny him due process or equal protection, since he could have guaranteed that he would have received notice by mailing a postcard to the putative father registry.

<sup>7</sup> See *Lehr* at 261.

<sup>8</sup> See *In the Matter of the Adoption of Doe*, 543 So.2d 741, 748 (Fla. 1989).

<sup>9</sup> *Stefanos v. Rivera-Berrios*, 673 So. 2d 12, 13 (Fla. 1996).

<sup>10</sup> See *Stefanos*, 673 So. 2d at 13-14 (holding that a person who has had parental rights terminated may not intervene in an ongoing adoption proceeding); *In re Adoption of a Minor Child*, 593 So. 2d 185 (Fla. 1991)(allowing grandparents to intervene); *Rickard v. McKesson*, 774 So. 2d 838 (Fla. 4th DCA 2000)(allowing potential trust beneficiary to intervene).

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

On March 15, 2006, the Civil Justice Committee adopted one amendment to the bill. The amendment changed the following:

- In a proceeding to terminate parental rights, the father must provide the Office of Vital Statistics of the Department of Health ("Office") with a copy of that petition. The Office may not record a claim of paternity after the date a petition has been filed.
- Alters the provisions regarding who may execute an irrevocable affidavit of paternity.
- Directs that if a court determines that a registrant is not the father of a child or has no parental rights; the court must order the Department to remove the registrant's name from the registry.
- Makes a change regarding inheritance rights to clarify that an adopted person has the same rights of inheritance as a blood descendant.
- Removes the provision that would authorize the Department of Health to release an original sealed birth certificate on court order only to the Department of Children and Family Services.

The bill was then reported favorably.